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with the universal American rule,[8] and, if the premise on which it proceeds is admitted, it is unimpeachable.

Obviously, then, the English rule can be upheld only by regarding payment into court as not necessarily an admission of the cause of action. But, then, what is it? It cannot be construed as an offer of compromise, made, through the court, at the last moment; for, on payment into court, the money becomes the property of the plaintiff whatever the outcome of the action. Perhaps it may best be interpreted as a sort of premium paid by the defendant to secure himself against payment of costs in case he is correct in his judgment that the plaintiff has no right of action for an amount beyond that tendered. Provided such is actually his intention, it seems reasonable enough to allow him this privilege, since the plaintiff can in no wise be prejudiced thereby.[9]

In a recent case of first impression on the point, the St. Louis Court of Appeals has followed the American rule. *Wells* v. *Missouri Edison Co.*, 84 S. W. Rep. 204. The case, however was a tort action, in which paymen into court is not a common law right, having been first given by statute.[10] Since no such statute exists in Missouri, it had previously been held that in such an action payment into court will not avail the defendant to escape the payment of costs, though the recovery is for a smaller amount than that brought in.[11] But if payment into court by the defendant in tort actions is void, it should be nugatory as well in respect of benefits to be derived therefrom by the plaintiff as by the defendant. The principal case, therefore, can be supported only if it overrules the earlier case.

Effect of Ultra Vires Transactions. — When the sovereign gave definite effect to the idea that the act of a community of men should be distinguished from their several acts by erecting the community into an artificial legal person,[1] the courts naturally had to pass upon the rights and liabilities of this new being. In its nature they found its limitations. Being invisible, it could appear only by attorney;[2] and being intangible, it could not suffer or commit personal injuries.[3] Having no soul,[4] it could not commit a crime[5] or take an oath.[6] All these limitations were inherent in its nature, and not due to any legal prohibition. Even in requiring a seal, the courts merely followed the custom of cor-

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8 See 1 Greenleaf, Ev., 16th ed., § 205.

9 See the opinions of Thesiger, L. J., in Berdan *v.* Greenwood, *supra*, and of Lord Bramwell, L. J., in Hawkesley *v.* Bradshaw, *supra*. On this point, too, later English legislation is suggestive. By Rules of the Supreme Court, 1883, Order XXII. rule 6, it is provided that, when payment into court is accompanied by an express denial of the right of action, and when the plaintiff persists in his suit, and recovers less than the amount tendered, the difference shall be returned to the defendant. It would seem, also, that, when the payment is unaccompanied by such denial, the old practice has been restored, and the defendant cannot show that no cause of action exists. See Dumbleton *v.* Williams, 102 L. T. 384.

10 St. 3 & 4 Will. IV. c. 42, § 21.

11 Joyner *v.* Bentley, 21 Mo. App. 26.

1 1 Poll. & Mait. Hist. Eng. Law, 2d ed., 502, 669 *et seq.*

2 Brooke Abr. *tit.* Corp. 63.

3 Brooke Abr. *tit.* Corp, 63. This has been doubted. See Grant, Corp. 278.

4 Tipling *v.* Pexall, 2 Bulst. 233.

5 See Case of Sutton's Hospital, 10 Co. 22 b, 32 b.

6 Wych *v.* Meal, 3 P. Wms. 310.

porate action.[7] In fact, the Statutes of Mortmain were the first to deprive corporations of privileges which both they and individuals were capable of exercising. But these statutes did not change their nature.

When, however, the question of the effect of *ultra vires* transactions first came before courts of the nineteenth century, the principles of agency were sufficient to overcome the difficulties which beset the ancient lawyers on account of their pseudo-anthropomorphic conception. Nevertheless, many courts seem to have confounded the older idea of inherent limitations with an idea of disability arising from lack of authorization by charter.[8] As a result, the law is in confusion. Many cases go to the extent of saying that an *ultra vires* transaction, whether executed or executory, is absolutely void. *Shaw* v. *National, etc., Bank*, 132 Fed. Rep. 658; *Anglo-American, etc., Co.* v. *Lombard*, 132 Fed. Rep. 721. Most of the authorities, however, agree in refusing to enforce a wholly executory *ultra vires* contract,[9] and also in refusing to overthrow the transaction if completely executed on both sides.[10] If one party has fully performed, and thereby conferred a benefit upon the other, the courts are almost evenly divided as to holding the party benefited to his bargain.[11] And where the act done is within the apparent power of a corporation, so that only its officers have means of knowing whether the contract is *ultra* or *intra vires*, some courts enforce it.[12] Moreover, in many of these cases, the *ultra vires* transaction is held so far effective as to give one of the parties quasi-contractual rights.[13]

Upon principle, as well as historically, the theory that a transaction is absolutely void simply because it is *ultra vires* is without foundation. Under this theory no corporation could commit a tort or a crime or do anything to justify *quo warranto* proceedings on the part of the State. The argument that in such cases a corporation is acting not in excess but in abuse of its powers is untenable, for abuses, as well as excesses, are strictly beyond the powers granted in the charter. The true doctrine would seem to be that a corporation has the power to do anything, while its charter defines the limits of its authority. Lack of authorization is not equivalent to absolute statutory prohibition;[14] but the stockholders and creditors have the right to rely upon the terms of the charter, and, therefore, to object to *ultra vires* transactions.[15] Upon this ground it has been ably argued that, in the absence of objection by creditors or stockholders, all *ultra vires* transactions should be enforced.[16] This contention, however, disregards the interest of the public in controlling and limiting corporate action within the bounds imposed by charter. It is this public policy which

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7 1 Poll. & Mait. Hist. Eng. Law, 2d ed., 683.

8 Thomas *v.* Railroad Co., 101 U. S. 71, 82 *et seq.*; Davis *v.* Old Colony R. Co., 131 Mass. 258. See South, etc., Ry. *v.* Great Northern Ry., 9 Exch. Rep. 55, 84.

9 Nassau Bank *v.* Jones, 95 N. Y. 115.

10 Long *v.* Georgia Pacific Ry. Co., 91 Ala. 519.

11 Bissell *v.* Mich. Southern, etc., Ry. Cos., 22 N. Y. 258, *per* Comstock, C. J.; National Bldg., etc., Ass'n *v.* Home Savings Bank, 181 Ill. 35.

12 Monument Nat'l Bank *v.* Globe Works, 101 Mass. 57.

13 McCormick *v.* Market Bank, 165 U. S. 538.

14 Sometimes statutes forbid a corporation to do *ultra vires* acts. In such a case the court must decide what the statute means, and apply the law in regard to any illegal contract. See 20 N. J. Eq. 542, 562, 564. Similarly in deciding the effect of the Mortmain Acts, the courts decided that the transaction was void as to superstitious corporations, but voidable as to other corporations. It is important to distinguish such cases from simple *ultra vires* acts.

15 Colman *v.* Eastern Counties Ry. Co., 10 Beav. 1.

16 Professor George Wharton Pepper in 9 HARV. L. REV. 255.

seems to explain the refusal of the courts to enforce such contracts when purely executory. Though the corporation has acted, the courts refuse to give effect to those acts. But when the contract is fully performed in good faith on one side, the public policy against its enforcement is overbalanced by the hardship which such refusal would cause. The disability, being imposed for reasons of public good, should be removed by the same considerations.

EXERCISE OF GENERAL CORPORATE POWER FOR PARTICULAR ULTRA VIRES PURPOSE. — Although the proposition that anyone dealing with a corporation must at his peril take notice of its charter or articles of association, and cannot recover on a contract in the making of which its corporate powers have been exceeded, is accorded general recognition as an established rule of law,[1] nevertheless there exists on the part of the courts a decided tendency to seize upon any exceptional circumstances as a basis for enforcing these *ultra vires* contracts. Accordingly, the rule is qualified in cases where a corporation has a certain general power and the circumstances are such that whether the particular exercise of this power is *ultra vires* depends on facts peculiarly within the knowledge of the officers of the corporation. The nature of this qualification is represented by the following classes of cases: (1) A corporation with power to issue negotiable paper in the course of its business is liable on its accommodation note in the hands of an innocent holder for value.[2] (2) A corporation with power to incur indebtedness up to a certain fixed amount is liable to one who in good faith loans it money in excess of that amount.[3] (3) By analogy, it has recently been held that where a corporation with power to borrow money for the purposes of its business exercises that power for another purpose, the loan is not thereby invalidated in the absence of knowledge by the lender of the improper purpose of the loan. *In re David Payne & Co., Limited,* [1904] 2 Ch. 608.

This leads to a consideration of the effect of knowledge, on the part of the contracting party, of the extraneous facts which render a contract *ultra vires*. It might be contended that actual notice is equivalent to notice presumed by the law in matters entirely outside the scope of the corporate business, and that, where the reason for the qualification does not exist, the rules applicable to *ultra vires* contracts in general should prevail. Such undoubtedly would be the result in the first two classes of cases. The third class, however, in spite of the importance attached by the court in the principal case to the absence of knowledge of the improper purpose of the loan, is to be distinguished on the ground that such contracts are not in fact *ultra vires*. When a corporation issues an accommodation note or borrows money in excess of a fixed limit, the transaction *per se* is *ultra vires*, and the contracting party is a participant in that *ultra vires* transaction; but when a corporation exercises its general borrowing power for an improper purpose, it is the improper application of the funds that is *ultra vires*, and in that part of the transaction the lender is not directly concerned. In contracts between individuals for the sale of goods, bare knowledge by a vendor that an unlawful use is to be made of the goods sold will not prevent recovery of

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1 Morawetz, Private Corporations, 2d ed., § 591.
2 Monument National Bank *v.* Globe Works, 101 Mass. 57.
3 Ossipee, etc., Manufacturing Co. *v.* Canney, 54 N. H. 295.